



Legislative Bulletin.....July 21, 2005

Contents:

H.R. 3199 — USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: Not significant, if any.

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: See below.

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 3199 — USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 (Sensenbrenner)

Order of Business: The bill is scheduled for consideration on Thursday, July 21st, subject to a structured rule. Amendments made in order under the rule ([H. Res.369](#)) will be summarized in a separate RSC document. This write-up is based on the combined text that was reported out from the Judiciary Committee and Permanent Select Committee on Intelligence and is referred to as Part A under the rule.

The USA PATRIOT Act (H.R. 3162 in the 107th Congress) passed the House by a vote of 357-66, passed the Senate by a vote of 98-1, and was signed into law on October 26, 2001, 45 days after the 9/11 terrorist attacks.

Summary: H.R. 3199 would reauthorize and modify certain provisions of the USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act and the Foreign Intelligence Surveillance Act (FISA). The original PATRIOT Act includes 16 provisions that sunset on December 31, 2005. This bill would permanently extend 14 of the 16 expiring provisions, and implement a new 10-year sunset for the remaining two provisions. In addition, the bill would make several other changes to the law relating to investigations of potential terrorist activity. Highlights of the bill by section are as follows:

Section 3(a): Permanently Extended Provisions. Section 3(a) of the bill repeals Section 224 of the PATRIOT Act (sunset section), permanently extending the following provisions that were contained in the originally passed PATRIOT Act and currently set to expire on December 31, 2005:

- Section 201: Authority to intercept electronic, wire, and oral communications (wiretapping) relating to terrorism. This section permits the use of court-supervised wiretaps in cases involving various terrorism offenses (delineated in 18 U.S.C. 2516).
- Section 202: Authority to intercept electronic, wire, and oral communications relating to computer fraud and abuse offenses. This section permits the use of court-supervised wiretaps in cases involving felony computer fraud or abuse.

Note: To exercise the authority granted in Sections 201 or 202, federal officials must obtain approval by a senior Justice Department official and apply for a court order approving the use of the wiretap. The order must be “narrowly drawn, of short duration, and based upon probable cause” that it will generate evidence relating to the offenses under investigation. When the order expires, those whose communications have been intercepted must be notified. Federal officials may return to the court to obtain extensions to the order, and current law allows for an indefinite number of extensions.

- Section 203(b): Authority to share intercepted electronic, wire, and oral information. This section permits foreign intelligence information obtained by a wiretap to be shared with federal law enforcement, intelligence, protective, immigration and military personnel for official use.
- Section 203(d): General authority to share foreign intelligence information. This section permits foreign intelligence information discovered in the course of a federal criminal investigation to be shared with federal law enforcement, intelligence, protective, immigration and military personnel for official use, unless there is a legal impediment.
- Section 204: Clarification of intelligence exceptions from limitations on interception and disclosure of electronic, wire, and oral communications. Section 204 is essentially a technical amendment clarifying that prior wiretap laws (which generally prohibit wiretaps) do not bar foreign intelligence-gathering activities (such as pen registers and trap & trace devices) under the PATRIOT Act.

- Section 207: Duration of FISA surveillance of non-United States persons who are agents of a foreign power. This section extends the allowable duration of FISA surveillance and physical search orders and extensions. It extends FISA wiretap orders that target foreign powers from a maximum of 90 days to 120 days (with a possible extension to one year), and physical search orders from 45 days to 90 days.
- Section 209: Seizure of voice-mail messages pursuant to warrants. This section permits use of a search warrant to seize unopened voice mail held by a service provider.
- Section 212: Emergency disclosure of electronic surveillance. This section allows service providers in emergency situations to disclose customer communications record information and the content of stored customer communications. Prior law limited the circumstances under which service providers might disclose specific customer communications.
- Section 214: FISA pen register and trap & trace authority. This section expands FISA pen register and trap & trace order procedures so that they apply to electronic communications (email and similar internet communications) along with telephone communications as are currently applicable.
- Section 217: Interception of computer trespasser communications. This section permits federal authorities to intercept an intruder's communications within an invaded computer system. It requires consent of the systems operator, a law enforcement investigation, and a reasonable belief that the communications are relevant to the investigation.
- Section 218: Foreign Intelligence Information. This section provides that FISA surveillance or physical search applications only need to certify that foreign intelligence gathering is a "significant" purpose for seeking the order rather than "the" purpose for the order. Further, this section clarifies that a "wall" between FBI criminal and intelligence investigators is unnecessary.
- Section 220: Nationwide service of search warrants for electronic evidence. This section authorizes nationwide execution of search warrants and court orders for customer communications records. Prior to the PATRIOT Act, federal authorities could gain access to this type of customer communications through the use of a search warrant or a court order, but it could only be issued in the judicial district where the warrant or court order would be executed. Thus, federal authorities charged that this hindered criminal investigations conducted in one district where the communications provider was located in another district.
- Section 223: Civil liability for certain unauthorized disclosures. This section creates a "cause of action" against the United States for official willful violations of Title III (the relevant section of the PATRIOT Act dealing with money laundering and anti-terrorist financing, among other things) or FISA; amends individual civil liability provisions of Title III for official unlawful disclosure or use; and allows disciplinary authority for agency officials over violations of Title III or FISA. Thus, a person subject to unlawful

use or disclosure of information obtained by a federal wiretap may take civil action against the United States, and agency heads have the authority to discipline federal officials for willful or intentional violations of Title III or FISA provision.

- *Section 225: Immunity for compliance with FISA wiretaps.* This section establishes immunity to service providers for assistance in the execution of, or compliance with, a FISA surveillance order.

Section 3(b): Temporarily Extended Provisions. Section 3(b) of the bill extends the sunset from December 31, 2005 to December 31, 2015 (a ten-year sunset extension) for the following two PATRIOT Act provisions:

- *Section 206: Roving surveillance authority under FISA.* This section permits roving FISA surveillance orders; orders do not need to specifically identify or name individuals when targets take actions to thwart surveillance. Thus, a roving wiretap may cover multiple locations, establishments, or neighborhoods because the target is being evasive and intentionally using multiple telephones for communication (rather than a single cell phone that could be more easily wiretapped). This provision is widely referred to as a “John Doe wiretap” since it allows for a surveillance order without authorities having to name a specific person under surveillance.
- *Section 215: Access to records and other items under FISA.* This section permits access to “tangible items” under FISA, including business records for hotels, motels, automobile rentals, storage facilities, library activities, internet service provider records, and other tangible items, regardless of the individual holding the item. This provision is widely referred to as the “Library” provision since libraries’ records are included in the type of “tangible items” available under a FISA order. According to the testimony of Attorney General Gonzales before a House Judiciary Committee hearing on April 6, 2005, Section 215 had never been used to obtain library or book store records.

Section 4: Agent of a foreign power definition extended permanently. This section repeals the sunset provision in Section 6001 of the Intelligence Reform and Terrorism Prevent Act (P.L. 108-458). Section 6001 amended the definition of an “agent of a foreign power” to include a foreign national who is preparing for or engaging in international terrorism. The modification precluded the need to show an illegal activity is being conducted on behalf of a foreign power (as long as the target is not an American).

Section 5: Crimes of terrorism outside national boundaries. This section repeals the sunset provision in Section 6603 of the Intelligence Reform and Terrorism Prevent Act (P.L. 108-458). Section 6603 defines penalties for various acts of terrorism transcending national boundaries (territorial sea, airspace above U.S. territories, at facilities under the jurisdiction of the U.S. government, etc.), and grants investigative authority to the Attorney General for all federal crimes of terrorism.

Section 6: Reporting of shared wiretap information to a judge. This section would require the government to file a notice with a judge “within a reasonable time after the disclosure” of

information that was intercepted using a wiretap (under Section 203(b) of the PATRIOT Act), stating details of the disclosed information and the “department, agencies, or entities to which the disclosure was made.”

Section 7: Duration of FISA surveillance. This section amends various sections of FISA by redefining a foreign agent as someone “who is not a United States person.” To see the previous definition of a foreign agent, see:

http://www4.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001801----000-.html

It also amends the allowable duration of a FISA order or extension to “not exceed one year” when the foreign intelligence information is not concerning a United States person.

Section 8: Access to business records. This section modifies Section 215 of the PATRIOT Act to establish a standard of relevance when obtaining business records under FISA. It would require “that the information likely to be obtained from tangible things is reasonably expected to be: A) foreign intelligence information not concerning a United States person, or B) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.” It also clarifies judicial discretion by requiring a judge to enter an ex parte order (a notice on behalf of one party *without* notice to any other party) approving the release of records when the judge finds that an application to access records meets *all* the requirements of the section. Further, the section grants authority to disclose to a “qualified person” the facts of an order to obtain records. A qualified person is defined as “any person necessary to produce the tangible things pursuant to an order under this section,” or “an attorney to obtain legal advice with respect to an order under this section.” This section also establishes a judicial review panel to review petitions filed (challenging the legality of the order) regarding this section, and sets out procedures for the panel.

Section 9: Report on emergency disclosures. This section requires that the Attorney General provide a report annually to the House and Senate Committees on the Judiciary containing “the number of accounts from which the Department of Justice has received voluntary disclosures” and a summary of the basis for such disclosures.

Section 10: Roving Surveillance Authority. This section requires the facts to support a FISA application for roving surveillance authority to be included in the application, by striking “where the court finds” and inserting “where the court finds, based upon specific facts provided in the application.” It also requires, when electronic surveillance is directed at a facility that was not known at the time the order is issued, that a judge be notified “within a reasonable period” of the surveillance and be provided the facts to support such surveillance.

Section 11: Surveillance of mass transit. This section prohibits surveillance, photographs, videotaping, diagrams, and other collection of information of mass transportation facilities with the intent to plan or assist in planning a terrorist attack (specifically defined in 18 U.S.C. 1993).

Section 12: Enhanced review of detentions. This section requires that the Department of Justice review the detentions of persons (under 18 U.S.C. 3144), including their length of detention, conditions and frequency of access to counsel, offense at issue, and the frequency of appearance before a grand jury.

Section 13: Forfeiture of property. This section expands the offenses under which property is subject to forfeiture to the United States when involved in an illicit transaction. It adds “trafficking in nuclear, chemical, biological, or radiological weapons technology” to the list of offenses.

Section 14: Definition of terrorism. This section expands the definition of a federal crime of terrorism to include “military-type training from a foreign terrorist organization” and “nuclear and weapons of mass destruction threats.”

Section 15: Expanded authorization for wiretap. This section expands the circumstances or potential offenses under which a high ranking Department of Justice official may authorize an application to a federal judge to obtain a wiretap. Specifically, it adds additional offenses under various sections of the PATRIOT Act that a wiretap may be requested and granted to investigate, including actions relating to: violence at international airports, biological agents and toxins, nuclear and weapons of mass destruction threats, explosive materials, possession of weapons in federal facilities, and damage to government buildings and communications.

Section 16: Period of reasonable delay. This section amends the definition of a “period of reasonable delay” for court orders under section 213 of the PATRIOT Act (regarding disclosure of electronic surveillance) to be no more than 180 days, and for additional periods of no more than 90 days.

Areas of Past Conservative Concerns: During debate of the USA PATRIOT Act in 2001 and in the subsequent years after passage, some conservatives have expressed concerns that the powers granted to federal authorities under the PATRIOT Act were unnecessarily broad and could infringe upon citizens’ constitutional rights under the First, Fourth, Fifth and Sixth Amendments. Frequently mentioned areas of concern are sections 206 (roving wiretap), 213 (sneak and peak), and 215 (access to records) of the PATRIOT Act. All three of these sections have been amended in the bill in an attempt to ameliorate some of these concerns, though Section 213 is not substantially altered.

Section 206 has been modified to: a) increase reporting requirements on wiretap order to a judge; b) reduce the allowable duration of a FISA surveillance order; c) require the specific facts that substantiate a roving surveillance order to be included within the order; and d) require that the order be updated and the judge notified in a reasonable time period when surveillance changes that the order covers.

Section 213 has been modified to reduce to the period of reasonable delay of notification for surveillance court orders be no more than 180 days, and for additional periods of no more than 90 days.

Section 215 has been modified to: a) establish a relevance standard to clarify that orders must be relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities; b) clarify that judges have the discretion to modify requested orders; c) clarify that the recipient of a Section 215 order may discuss the order

with an attorney to obtain legal advice and may challenge the order; and d) provide for a judicial review panel to review challenges to the legality of a Section 215 order. Under current law, the Department of Justice is required to inform Congress each time Section 215 is used.

Administration Policy: A Statement of Administration Policy (SAP) was not available at press time.

Amendments: Amendments made in order under the rule will be summarized in a separate RSC document.

Committee Action: H.R. 3199 was introduced on July 11, 2005, and referred to the Committee on the Judiciary and the Permanent Select Committee on Intelligence (for consideration of those provisions that fall within their respective jurisdictions) on July 11th. The bill was considered and a mark-up session held by both committees on July 13th. The bill was reported out by the full Judiciary Committee by a vote of 23-14 and by the full Intelligence Committee by voice vote on July 13th (H. Rept. [109-174](#)).

Cost to Taxpayers: CBO estimates that “implementing H.R. 3199 would have no significant cost to the federal government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant.”

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, as noted in Sections 13, 14 and 15 above. However, the bill also narrows the scope of federal government authority in several areas. It permanently extends already existing provisions of the PATRIOT Act, clarifies federal authority, sets new restrictions and reporting requirements, and expands the rights of individuals involved in or the object of federal terrorism investigations.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to CBO, “Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that the provisions of this bill are either excluded from UMRA because they are necessary for the national security or they contain no intergovernmental or private-sector mandates.”

Constitutional Authority: The Permanent Select Committee on Intelligence, in [House Report 109-174 - Part 2](#), cites constitutional authority in Article 1, Section 8, Clause 1 (to provide for the common defense) and Clause 18 (to make laws to execute the foregoing powers). The House Judiciary Committee, in [House Report 109-174 - Part 1](#), cites constitutional authority in Article 1 (vesting Congress with “All legislative Powers”), but fails to cite a specific Section or Clause.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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